Harry Lunstead Designs, Inc. *and* Local Union No. 3-9 International Woodworkers of America, AFL-CIO, Petitioner. Case 19-RC-10133

13 June 1984

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

Pursuant to a Stipulated Election approved by the Acting Regional Director for Region 19 13 March 1981, an election by secret ballot was conducted 15 May 1981, under his direction and supervision, among the employees in the appropriate unit. At the conclusion of the election an amended corrected tally of ballots was served on the parties which showed that there were approximately 62 eligible voters and 61 cast ballots, of which 31 were cast for the Petitioner, 29 were cast against the Petitioner, and 1 was challenged. One ballot was declared void. The amended corrected tally of ballots reflected that the challenged ballot was insufficient to affect the results of the election. Thereafter, the Employer filed timely objections to the election.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, the Acting Regional Director caused an investigation to be made of the issues raised by the objections. On 20 August 1981 the Acting Regional Director issued and duly served on the parties his "Report and Recommendation on Objections to Election and Challenged Ballot," in which he recommended that the Board overrule all of the Employer's objections, that it sustain the challenge to the ballot of voter Steve McClain, and that the Petitioner be certified as the statutory representative of the Employer's employees in the appropriate unit.

On 10 December 1982 the Board issued a Decision and Order, 265 NLRB 799 (1982), directing, inter alia, a hearing for the purpose of receiving evidence to resolve the issues raised by the Employer's Objection 10.[1] That objection concerns whether the Employer waived its challenge to the ballot of Kathy Wedde,[2] based on alleged representations by the Board agent conducting the election that the Employer "need not 'challenge' and could appeal the matter later."

Pursuant to an order directing hearing issued 20 December 1982, a hearing was conducted in Seattle, Washington, 7 January 1983 before Hearing Officer Donald E. Chavez, duly designated for that purpose, at which the Employer, the Petitioner, and counsel for the Regional Office appeared and participated. All parties were given a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence relating to the issues involved.

On 24 January 1983 the hearing officer issued a report and recommendations which recommended that the Employer's Objection 10 be overruled and that the Petitioner be certified as the exclusive collective-bargaining representative of the Employer's employees in the appropriate unit. Thereafter, the Employer filed exceptions and a supporting brief, and the Petitioner filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the hearing officer's findings and recommendations only to the extent consistent herewith.

As noted above, the hearing officer recommended that Objection 10 be overruled, and that the Petitioner be certified as the representative of the Employer's employees in the appropriate unit. Contrary to the hearing officer, however, we find merit to the Employer's exceptions. In reversing certain findings of the hearing officer, we have found it necessary not only to reverse some of his legal conclusions, but also to reject certain of his credibility findings. In the past the Board has been very reluctant to overturn a hearing officer's credibility findings, *Coca-Cola Bottling Co. of Memphis*, 132 NLRB 481, 483 (1961), citing *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). In this case, however, we conclude that with respect to certain matters a clear preponderance of all the relevant evidence establishes that the hearing officer's credibility resolutions were incorrect and without proper support in the record. Accordingly, we are compelled to make our own findings of fact and appropriate conclusions based on substantial evidence in the record.

The Employer's objection raises three issues: whether the Board agent conducted the preelection conference in such a fashion as to cause confusion concerning the challenge procedure as it related to Kathy Wedde; the effect on the conduct of the election of the Board agent's telling the Employer's observer that there could be only one list in the polling area; and whether the Board agent had a duty to challenge the ballot of Kathy Wedde.

[1] The Board also sustained Objection 11, and the amended corrected tally of ballots was thereby altered to reflect 30 votes cast against the Petitioner, and 31 votes cast for the Petitioner.

[2] Although our earlier decision referred to "Karen Wedde," the record herein is clear that the correct name of the individual in question is "Kathy Wedde."

I. THE ELIGIBILITY STATUS OF KATHY WEDDE

Prerequisite to our analysis is a determination as to the eligibility status of Kathy Wedde. Thus, contrary to the Petitioner and the hearing officer, each of whom took the position that Wedde's status as an employee is irrelevant to the issues herein, we note that a finding that Wedde was an eligible voter would have obviated the need for disposition of the allegations now before us. *Kentfield Medical Hospital*, 219 NLRB 174, 175 (1975). Nonetheless, and based on the record evidence, we conclude for the reasons set out below that, on the date of the election, Kathy Wedde was not employed by the Employer and was thus ineligible to vote. The record reflects in this regard that, in December 1980, Wedde was apparently injured while at work and did not return to work. The Employer maintained Wedde's name on the payroll in the event she might return, and then in March 1981 placed her name on inactive status. Thereafter, having discussed the matter with some members of the production department, and having ascertained that there was little chance that Wedde would return, Robert B. Riley, the Employer's comptroller, who also heads the personnel program, submitted a final termination slip and removed Wedde's records from the "open" files. Riley testified that he followed the Employer's standard practice utilized in situations similar to Wedde's, and the Employer's "payroll change" record dated 23 April 1981 reflects that Wedde was terminated due to extended absence.[3] Based on all of the above, we find that Kathy Wedde was not employed by the Employer on the date of the election, and conclude that she was not an eligible voter.

II. THE HEARING OFFICER'S FACTUAL FINDINGS

With respect to the issues raised by the Employer's objection, the record reflects that a preelection conference was held which was attended by the following individuals: Board agent Melvin Kang; Robert Riley, the Employer's comptroller; Alfred Feichtinger, vice president of production and engineering; Harry Lunstead, the Employer's president; Roger Stockwell, production manager; Forest Pool, the Petitioner's organizer; and Brian Fyfe and Maureen Malthesen, the Petitioner's and the Employer's observers, respectively. The hearing officer found that Board agent Kang opened the preelection conference by describing how the election would be conducted, and that he handed out printed instructions to the observers. The hearing officer additionally found that the observers were advised that they had a right to challenge anyone that came to vote at the time the person presented himself to vote. At this point, the parties reviewed the *Excelsior* list (*Excelsior Underwear*, 156 NLRB 1236 (1966)) to ascertain whether the changed employment status of certain individuals was reflected therein, the parties deleting the names of those persons whom they agreed had been terminated and were no longer eligible to vote. The status of Kathy Wedde was then discussed. The hearing officer found that all witnesses were in substantial agreement with the above account of what occurred, but that the witnesses differed as to their respective descriptions of subsequent events.

With respect to the disputed facts, the hearing officer credited the testimony of observer Fyfe and Board agent Kang, and found the following composite of their credited testimony to be reflective of what actually occurred at the preelection conference:

> When the parties arrived at K. Wedde's name on the *Excelsior* List, there was an exchange by Riley and Pool as to her eligibility. The end result was that Riley agreed to let Wedde vote if she appeared. There was no inquiry as to appealing her vote at a later time. Unlike the other names that were deleted by agreement of the parties because of termination of employment, Wedde's name was not deleted by crossing out or initialing. The Board Agent had asked Riley and Pool to go back to the *Excelsior* List and initial each name that they had agreed to delete from the list. Riley's statements and actions left the Union representatives and Board Agent to believe that the Employer had agreed to leave Wedde on the Excelsior List as an eligible voter. Both Riley and Malthesen were well aware of and understood the challenged ballot procedure at the time of the pre-election conference and both concede that the challenged ballot procedure was the one and only method described by the Board Agent through which a voter's vote could be challenged. At the time of the election Malthesen admitted being aware that Wedde's name was not on the Employer's list of eligible voters and that she had been told by Riley to challenge anyone not on that list.

Based on the above-credited version of events, the hearing officer found that the Employer expressly agreed to the eligibility of Wedde; that the Board agent did not at any time indicate a procedure for challenging voter eligibility other than the challenge procedure; and that the failure timely to

[3] In these circumstances, the fact that Wedde may not have been formally notified of her termination is not determinative. *Hercules, Inc.*, 225 NLRB 241, 242 (1976).

challenge Wedde's ballot was the result of an unreasonable assumption on the part of the Employer, and the negligence of the company observer who failed to challenge a voter whom she knew was not on the Employer's own eligibility list, and whom she had been specifically instructed to challenge.

III. THE HEARING OFFICER'S CREDIBILITY RESOLUTIONS AND OUR ANALYSIS THEREOF

In crediting Petitioner observer Fyfe and Board agent Kang, the hearing officer stated that their respective testimony "appeared frank and forthright," and that such testimony was "more accurate and reliable" than the accounts given by Riley and Malthesen. The hearing officer additionally noted that, on the date of the hearing, Fyfe was still employed by the Employer. In this regard, the hearing officer stated that:

> The average employee is keenly aware of his dependence on the employer's good will. With this in mind, and having much to lose by giving testimony adverse to the Employer, Fyfe did so realizing his exposure to considerable peril of economic reprisal. It can be said that such testimony being adverse to the Employer was in a sense contrary to his own interest. For this reason, such evidence is not likely to be false.

We do not agree. We note at the outset that the hearing officer's credibility resolutions are based almost completely on testimonial analysis, and his brief statement concerning the "frank and forthright" testimony of Fyfe and Kang is the only indication of what might be characterized as a finding with respect to demeanor. We note, in this regard, that the hearing officer made no adverse demeanor findings with respect to the Employer's witnesses. As to the hearing officer's comments concerning the perils attendant to an employee's giving testimony adverse to his Employer's interests, we are constrained to point out that there is absolutely no evidence of employer animus herein, and that a witness' status as an employee is only one factor among many to be considered. See generally *Hornell Nursing & Health Related Facility*, 221 NLRB 123, 123 (1975), which noted that neither *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), "nor the application of sound reason leads to the conclusion that an individual's employment status standing alone constitutes a valid basis for concluding such individual's testimony to be inherently more credible . . . [although] it is a permissible factor to be considered." Accordingly, we conclude that Fyfe's status as an employee does not, in and of itself, render his testimony inherently reliable.

In support of his adverse credibility determination with respect to Riley and Malthesen, the hearing officer stated that Riley and Malthesen contradicted each other's testimony in certain respects. Thus, the hearing officer asserted that Malthesen testified that Riley, in response to Kang's alleged representations, stated, "[Wedde] can vote with the stipulation something could be done." The hearing officer further asserted that Riley testified that he simply stated that Wedde could vote, and that "[w]hatever his belief or understanding, Riley made no statement about a stipulation. This appears to be a case of Malthesen's embellishing her testimony so as to put the Employer's case in a more favorable light."

We disagree. While the record initially reflects that Malthesen does testify using the word "stipulation," a further reading of the record makes it readily apparent that Malthesen, while testifying, did not understand the distinction between those words which were actually spoken, as opposed to the unspoken understanding of the participants; and that, when such distinction was pointed out, Malthesen amended her testimony and stated, "I know that it was all of our understanding. I don't recall if . . . [stipulation] was exactly said." Thus, contrary to the hearing officer, Malthesen did not contradict Riley in this regard, nor did she intentionally embellish her testimony.

The hearing officer additionally stated, "Malthesen further testified that employee Brian Fyfe stated during the pre-election conference that Wedde shouldn't be able to vote because it was his understanding also that she had been terminated. No other witness corroborates this testimony, including Riley." We disagree, for it is clear that the hearing officer's analysis is based on an incomplete reading of the record. Thus, the record reflects that Malthesen testified as follows:

> It seemed to me at the time that Brian Fyfe even said he was rather surprised, that she shouldn't be able to vote because it was his understanding also that she had been terminated, *or that she hadn't been there to work for a long time.* [Emphasis added.]

Riley testified that "Brian Fyfe even indicated that he knew she hadn't been working there for awhile . . . ." Contrary to the hearing officer, and based on the above-cited testimony, including the underlined phrase omitted by the hearing officer, we conclude that Malthesen and Riley do corroborate

each other, and that only Brian Fyfe's version is inconsistent.[4]

Finally, the hearing officer stated that Riley testified that Feichtinger made the crucial inquiry of the Board agent as to whether something could be done to contest the vote of Wedde at a later time. Fyfe, Kang, and Pool,[5] on the other hand, all testified that Feichtinger did not make any such statement and that Riley was the only employer representative who spoke at the preelection conference. The hearing officer concluded, "As I have credited the versions of Fyfe and the Board Agent, I do not credit Riley in this respect. Further, the Employer had the ability, but failed to call two Employer witnesses to this disputed conversation. One of the two witnesses is Feichtinger, who allegedly made this inquiry upon which the Employer claims to have relied."

The hearing officer does not appear to have disclosed the basis for his credibility resolutions concerning the Feichtinger inquiry, except to note that the Employer did not call Feichtinger as a witness. Contrary to the hearing officer, we cannot find the testimony of Fyfe and Kang to be believable or plausible.

The record reflects that on direct examination Fyfe testified as follows:

> Q. Would you go through what occurred at that pre-election conference?
>
> A. We were all present. [Kang] started off with a brief description on how the election is ran and what would be done. He brought out the excelsior list and we went through it and we started going name by name, and we got down to Kathy Weede's [sic] name and Bob Riley said she was no longer employed with the company. Forest Pool asked if she had been terminated or laid off. Riley really gave no answer.
>
> He—Forest Pool asked if she had been notified of any termination and people for the company all looked at each other and sort of just shrugged their shoulders and did not answer the question and said that if she comes in to vote, they will go ahead and let her vote.
>
> Q. Who said that, if she comes in to vote—
>
> A. That was Bob Riley.

On cross-examination, the following exchange took place:

> Q. So what you're saying is that when the question came up, Mr. Riley sort of just looked around the room and nothing further was said and—
>
> A. He was asked if she had been notified of her termination.
>
> Q. Then he just looked around the room and didn't say anthing?
>
> A. He did not look around the room. Him, Alfred [Feichtinger] and Harry [Lunstead] and Stockwell all sort of looked at each other, and they did not give an answer one way or the other.
>
> Q. Did Mr. Feichtinger say anything to anybody in the room?
>
> A. No.
>
> Q. They were all quiet and didn't say a word?
>
> A. They were awed by her being on the excelsior list.

Pool also testified concerning this incident:

> Q. Now, when you got to K. Weede's [sic] name on the list, would you tell us the conversation that occurred?
>
> A. Yes. Bob Riley stated that he didn't think she would be able to vote, that she had been terminated, and I asked Bob, I said was she notified of termination. He said—he at first didn't answer.
>
> Q. What did he do?
>
> A. He looked around the room, and then after that agreed that she was eligible to vote.

Board agent Kang was also examined on this point:

> A. So every time Mr. Riley would pass a name over off the excelsior list, we would stop and there would be a discussion as to whether or not that name would be deleted or not. I believe in almost every instance it was because the person was no longer employed, and that continued with the Union and the Employer agreeing to delete names until we got to an employee by the name of Weede [sic]. At that point there was a discussion as to whether or not—we got to that name and Mr. Riley said he wanted to delete her, the reason being she was no longer employed. And Mr. Pool said that he thought she was on a state industrial leave. Then there was an exchange between Mr. Riley and Mr. Pool. I remember—
>
> Q. Excuse me. Did you take part in that exchange?
>
> A. No, I did not.
>
> . . . .

[4] Fyfe testified, "I believe my only statement then was that I thought she was out on workmen's compensation because she had been injured at work." We note that Fyfe qualified his testimony in this regard, using the phrase, "I believe."

[5] We note that the hearing officer neither credited nor discredited Pool.

Q. All right. What happened next?

A. At one point Mr. Riley said she was in the hospital and he didn't think she would vote anyway. So they agreed to leave her on the list.

. . . .

Q. All right. If you recall, what specific words did Mr. Riley use and what specific words did Mr. Pool use to show their agreement?

A. I don't remember the exact words they used. I know there was some signal that we should go on and she would stay on the list. I know that we had to finish the list after that. After we'd gone through each name on the list, Mr. Riley and Mr. Pool . . . initialed each of the names that were scratched out . . . and . . . also initialed the bottom of each page of the list.

Q. At any time during the pre-election conference, did you engage in a conversation with Alfred Feichtinger, do you recall?

A. No, I don't.

[Q.] Is it that you don't recall or are you saying there was no conversation?

A. I don't believe I had any conversation with that gentleman.

Q. . . . during your earlier testimony you testified that in addition to Mr. Riley there were two other males present for the company. You did not at that time know their names. Did you engage in a conversation at any time during the pre-election conference with either of those two men?

A. No.

On cross-examination, Kang testified as follows:

Q. Did anybody else say anything for the Company besides Mr. Riley in that meeting?

A. I don't recall anybody else speaking for the company.

Q. Everyone else sat there and didn't say a word?

A. There may have been conversations between themselves, but I don't recall any conversations.

Q. Do you recall this individual named Mr. Feichtinger?

A. I recall that there was two other people—two other males besides Mr. Riley. I don't think I can identify him.

Q. Did you speak at that time with any of those other males beside Mr. Riley?

A. No.

Q. None—no conversation whatsoever?

A. No.

As is obvious from a review of Kang's testimony, he was far from unequivocal in his recollection of what occurred at the preelection conference. Thus, Kang, for the most part, could not recall whether any conversation involving Feichtinger occurred, and he was notably vague concerning how it came about that Riley agreed that Wedde should be allowed to vote.[6] By contrast, the testimony of both Fyfe and Pool is fairly detailed—until the crucial moment at the preelection conference when their respective descriptions of who said what to whom become, like the Kang testimony, disconcertingly blurred. Thus, the Fyfe-Pool-Kang versions have Riley—for no apparent reason, and based on some form of nonverbal interchange—suddenly reversing his position and agreeing that Wedde can vote. This, in spite of the fact that Riley had specifically and consistently argued that Wedde was no longer employed. Simply put, this version makes no logical sense, and we do not rely on it.

IV. THE CREDITED VERSION OF EVENTS AND FURTHER FACTUAL FINDINGS

Contrary to the hearing officer, we credit the Employer's witnesses based on the complete and detailed nature of their testimony, as well as the inherent probabilities of the events. Thus, Riley testified:

> And then the one that we got caught up at the end when the name—on the list it said K. Weede [sic], but when Kathy Weede's [sic] name came up, I said she had been terminated in April and should not be on the list. Mr. Pool said no, he was showing that she should be voting. And at that point in time we went back and forth a few times. Brian Fyfe even indicated that he knew she hadn't been working there for awhile, and then it kind of bogged down a bit. And at that point in time I asked Mr. Kang, I said, do we have to settle this before we go on, and he said yes, we need to come up with a decision on this person before we go on with the list.
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> At that point, Alfred Feichtinger . . . said if we agree, can we move along and contest this at a later date. And at that point Mr. Kang said yes. With that understanding I then signed next to her name, and believing that we would at the later date be able to do something be-

[6] Indeed, based on a review of the evidence given by Kang, we find his testimony to be inherently unreliable. Thus, Kang's testimony was, for the most part, vague and was filled with responses that plainly reflect his inability to recall what occurred.

sides challenge. I was well aware of the challenge process.

Malthesen also testified concerning this incident:

> Q. How was [Wedde's] eligibility resolved?
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> A. In the discussion, Bob Riley didn't think she should be able to vote and Mr. Pool thought that she should. Then Mr. Alfred Feichtinger asked if we could appeal her vote later, and Mr. Kang said yes, that would be what we could do, something that could be done later.

The record further reflects[7] that, after the preelection conference, Kang and the observers went to the polling area. Malthesen, the Employer's observer, had brought with her a copy of the company eligibility list, essentially a current payroll list, and she had been instructed by Riley to challenge anyone whose name was not on that list. Prior to the start of the election, however, Kang confiscated Malthesen's list, and told her that there could be only one list in the room. During the election, Kathy Wedde presented herself at the polls, and voted without being challenged.

After the polls had opened, and Riley had returned to his office, he reviewed the election rules. Riley testified:

> I began to have second thoughts about what Mr. Kang had indicated and that we could contest the Kathy Weede [sic] vote later. And just to make sure, I then called our attorney . . . to see if, indeed, we could contest at a later date and if, indeed, we had to do that or challenge.
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> Q. What were you told?
>
> A. You told me that under no circumstances could it be appealed, that that was misleading information and that we had to file a challenge.

The record further reflects that Riley sent a note to Malthesen instructing her to challenge Wedde, but that the note arrived after Wedde had cast her unchallenged ballot. Riley testified that at the time the ballots were tallied, he told Kang

> . . . that we'd meant to contest the Kathy Weede [sic] vote, that I had felt he had indicated that we could appeal or contest it at a later date and that she should not have voted. And he said well, it was too late. "You can appeal the election, but she has already voted."

[7] We note that the hearing officer made no specific findings concerning facts hereinafter set forth.

A review of the testimony reflects that the recollections of Riley and Malthesen are consistently detailed and mutually corroborative.[8] In addition, as alluded to above, we find that the logical probabilities support the Employer's version of events. Thus, with respect to the Employer's understanding as to the proper procedure for contesting a voter's eligibility, the record is clear that, to the extent that the challenge procedure was discussed, such discussion occurred prior to the exchange about Wedde's eligibility. There was, therefore, no linkup between the concept of the challenge procedure and the problem posed by the conflict over Wedde's eligibility. In addition, because Kang's response to Feichtinger's question could, under these circumstances, be construed to indicate the existence of some other "appeal" process, the fact that the Employer's representatives were aware of the challenge procedure is not significant. Furthermore, had Riley agreed to allow Wedde to vote based on what the hearing officer asserted was Riley's apparent changed position with respect to Wedde's eligibility status, there would be no logical reason for Riley to contact his attorney to inquire about an alternative to the challenge ballot procedure. Finally, under the circumstances herein, we assign no significance to the fact that the Employer's observer, Malthesen, voiced a challenge when a former employee, Steve McClain, presented himself to vote. Thus, McClain's name did not appear on the *Excelsior* list[9] and, unlike the Wedde situation, there is no evidence that McClain was the subject of any discussion during the preelection conference.

Accordingly, based on all of the above, we credit the testimony given by the Employer's witnesses, and find that Alfred Feichtinger asked the question: "[i]f we agree, can we move along and contest this at a later date?" Board agent Kang replied "Yes," and, in reliance thereon, the Employer agreed to allow Wedde to vote, having made the assumption that Wedde's eligibility would be otherwise considered.

V. ANALYSIS AND CONCLUSIONS

In drawing his conclusions, the hearing officer reasoned that, "[a]ssuming the versions given by Riley and Malthesen to be the more accurate ones,

[8] In this regard, we attach little weight herein to the fact that Feichtinger did not testify. Thus, had Riley not been corroborated by Malthesen, we might have assigned more significance to Feichtinger's not having been called as a witness.

[9] Although the record does not reflect whether McClain voted before Wedde, the evidence does show that, when Malthesen voiced a challenge to McClain's vote, Kang, in effect, told Malthesen that the proper procedure for challenging an individual whose name does not appear on the *Excelsior* list is to have the Board agent voice the challenge.

such would still not amount to objectionable conduct." The hearing officer based his conclusion in large part on the fact that the Board agent did not affirmatively misrepresent the challenge procedure, and that the only procedure described to contest a vote was the Board's established challenged ballot procedure. Based on his view of the record evidence, the hearing officer concluded:

> At best, the Employer's version would have the Board Agent informing the parties that Wedde's eligibility did not have to be agreed upon in the pre-election conference but could be determined at a later time; and the method for determining Wedde's eligibility at a later time would of course be accomplished through the challenged ballot procedure. For the Employer to conclude that there existed an alternate means of contesting a voter's eligibility was an unreasonable interpretation of the Board Agent's statements.

We disagree. Thus, as set out above, to the extent that Kang explained the challenge process at the preelection conference,[10] the evidence is plain that there was no connection made between the discussion as to Wedde and the challenge procedure. There is, therefore, no record, or logical, support for the hearing officer's rationale that the Employer would be cognizant of the fact that any subsequent determination of Wedde's status would "of course" be through the challenge procedure. Indeed, we find the hearing officer's conclusions to be based on an unreasonable interpretation of the record.

In addition, and contrary to the hearing officer, the pivotal factor is not that the Board agent affirmatively misrepresented the challenge procedure—which we agree he did not—but, rather, that when Feichtinger asked, "if we agree, can we move along and contest this at a later date," Board agent Kang merely replied, "Yes," and failed to properly redirect the attention of the parties to the Board's challenge procedure as it would relate to the ultimate resolution of Wedde's status. It was this error of omission which caused the Employer reasonably to believe that the Wedde vote could be contested even if the parties agreed to allow her to cast an unchallenged ballot.

We likewise find that the Board agent erred when, after confiscating the eligibility list the Employer's observer intended to use to challenge the voters, he told her simply that "there could be only one list in the room." Thus, review of the relevant case law supports a finding that the Board agent's instructions in this regard were overly broad. In *Bear Creek Orchards*, 90 NLRB 286 (1950), the Board considered an objection requesting that the election be set aside on the ground, inter alia, that the use of a list of names of employees, which the petitioner had prepared in order that its observer might use it for challenges, was denied them. The investigation revealed that the then election examiner had advised the petitioner that no list would be permitted other than the company's voting list. The Board found that insofar as the election examiner prevented the petitioner from retaining, for its own use at the polls, a list of prospective voters whose ballots it wished to challenge, the election examiner interfered with the conduct of the election and a new election was ordered. In *Milwaukee Cheese Co.*, 112 NLRB 1383 (1955), however, the Board considered a situation in which the union observer appeared at the polls with a duplicate of the official eligibility list containing checkmarks next to the names of certain employees he intended to challenge. After being informed by the Board agent that the Board's election rules prohibit the use of all but one eligibility list, the union observer transposed certain markings by the names of voters he intended to challenge from his duplicate to the official list. The Board distinguished *Bear Creek* from *Milwaukee Cheese*, stating that a duplicate of the official eligibility list with the names of voters intended to be challenged marked thereon is not the type list contemplated by *Bear Creek*, and overruled the union's objection to the Board agent's conduct.

Although *Bear Creek* and *Milwaukee Cheese* distinguished between types of "challenge lists," and discussed what type is to be considered permissible, nowhere does the Board state that the *Excelsior*, or "voting," list is the only permissible list insofar as challenges are concerned. On the contrary, both cases indicate that a party to an election is entitled to a means of recording the names of employees' ballots it intends to challenge.[11] Accordingly, we find that the Board agent's statement to Malthesen that there could be only one list in the room, without further clarification, was overbroad, and therefore erroneous.

It should be noted that we do not, hereby, require that a Board agent charged with supervising an election adhere to a scripted set of instructions, and that any deviation therefrom will be cause for

[10] Although there is testimonial conflict as to the degree to which the Board agent explained the Board's challenge procedure, the substance of such explanation is not at issue.

[11] Sec. 11338.2 of the NLRB Casehandling Manual (Part Two), Representation Proceedings, provides in pertinent part as follows: "Observers may maintain lists of persons they intend to challenge, but the better practice is to permit the parties to note on the eligibility list, at the preelection check, the persons they intend to challenge."

requiring a new election. What we wish to emphasize, however, is that at an election the parties *do* look to the Board agent for guidance concerning the various procedures which the Board has devised to ensure a fair election. In giving such guidance, and depending on the particular situation at hand, the Board agent must use his or her best judgment to make certain that the parties are cognizant of what the Board requires. Our review of the record convinces us that the Board agent made an error in judgment in failing to link the challenge procedure to the resolution of Wedde's status, and erred in giving overly broad instructions to the Employer's observer concerning the keeping of a challenge list; that the Board agent's error at the preelection conference led the Employer reasonably to believe that, with respect to Wedde, it would be unnecessary for the challenge procedure to be invoked; and that this belief, combined with the Board's agent's overly broad instructions at the polls, caused the Employer to allow Wedde to cast an unchallenged ballot when she appeared to vote.

We thus conclude, based on all of the above, that the Board agent's errors, both at the preelection conference, and at the polls, interfered with the conduct of the election.[12] We shall, therefore, set aside the election of 15 May 1981, and shall direct that a new election be held.

ORDER

It is ordered that the election of 15 May 1981 be set aside.

[Direction of Second Election omitted from publication.]

MEMBER HUNTER, dissenting.

Contrary to my colleagues in the majority, I would adopt the hearing officer's findings and recommendations and certify the Union as the exclusive bargaining representative of the employees in the stipulated unit.

The majority finds that the Board agent conducting the election engaged in two acts of misconduct and orders a new election on that basis. First, substituting its own version of the facts for the facts found by the hearing officer, the majority finds that at the preelection conference the Board agent erred by answering "yes" to a question about whether the eligibility of a voter could be resolved later. The hearing officer found that during the preelection conference the parties reviewed the official *Excelsior* eligibility list to make any necessary corrections. When they reached the name Kathy Wedde the Employer's comptroller, Riley, stated that Wedde had been terminated, and union representative Pool disputed this assertion. A discussion followed in which Pool asked whether Wedde had ever been notified that she was terminated. At that point, Riley looked at the other employer representatives in the room and then agreed to leave Wedde's name on the eligibility list. It is undisputed that the Employer had not informed Wedde that she had been terminated. Despite this, and despite the fact that the credited version of the conversation was based on the mutually corroborative testimony of union agent Pool, the Union's observer, and the Board agent, the majority rejects the credited version as making "no logical sense." Crediting the version given by Riley and the Employer's observer, Malthesen, the majority finds that, at the end of the discussion about Wedde, one of the employer representatives asked the Board agent whether her eligibility could be resolved later, and that the Board agent simply answered "yes." The majority finds that, on the basis of the Board agent's response, Riley agreed to leave Wedde's name on the list, believing that there was some postelection procedure for determining voter eligibility.

Despite my colleagues' extensive efforts to reverse the hearing officer's credibility resolutions, I am unpersuaded. Thus, I find nothing inherently illogical about Riley's agreeing to let Wedde vote after the union agent asked whether she was ever notified of her purported termination, since admittedly Wedde never was so notified. The testimony that, before agreeing to let Wedde vote, Riley looked silently at his colleagues in the room neither adds to nor detracts from the credibility of the testimony that he agreed to let her vote. I cannot agree with my colleagues that this testimony shows that the version credited by the hearing officer was based on some form of "nonverbal communication" which "makes no logical sense." Further, even accepting the version of the conversation credited by the majority, I do not agree that there is any basis for setting aside the election. Thus, it is undisputed that during the preelection conference, which lasted only about 20 minutes, the Board agent described the challenge procedure and distributed copies of the Board's official "Instructions to Observers" form which states that any challenge to the eligibility of a voter "MUST be made before the voter's ballot has been placed in the ballot box." (Capitalization in the form.) It is also undisputed that the Board agent did not describe or suggest any other means to contest voter eligibility. In

[12] Inasmuch as we have decided to set aside the election for the above reasons, we find it unnecessary to consider the Employer's further contention that under the circumstances of this case the Board agent had a duty to challenge the ballot of Kathy Wedde. We do note, however, that the Board agent, at the preelection conference, should have required the parties to present evidence bearing on the issue of Wedde's status.

these circumstances, even assuming, as my colleagues find, that the Board agent gave an affirmative answer to a question about whether Wedde's eligibility could be resolved later, the most reasonable inference to be drawn is that he was referring to the challenge procedure. Consequently, the Employer could not reasonably have been misled by the Board agent's answer. And, indeed, there is strong evidence that the Employer was not misled by any such statement. Thus, the Employer's observer, Malthesen, testified that following the preelection conference Comptroller Riley told her to challenge any voter whose name did not appear on the Employer's then current payroll list, and that Malthesen knew Wedde's name was not on that list.[1] Accordingly, even under my colleagues' version of the preelection conference discussion, I find no basis for setting aside the election.

The majority also sets aside the election based on a finding that the Board agent engaged in misconduct by telling the Employer's observer that only one list was permitted in the polling area. In so doing, the majority relies on an incidental statement in the testimony of the Employer's observer Malthesen. It is clear that there was no adequate notice that this matter was in issue as possible objectionable conduct, and that it was not litigated. In this regard, I note that the previous Board Order in this proceeding directed a hearing solely on the issue of the Employer's waiver of its right to challenge Wedde. Furthermore, Malthesen's testimony concerning the Board agent's statement in the polling area was not further developed at the hearing by either party, the hearing officer made no finding with respect to it, and neither party addressed the question in their briefs to the Board. Therefore, contrary to my colleagues, I am unwilling to set aside the election on the ground of Board agent statements in the polling area. Moreover, even assuming adequate notice and an opportunity to litigate the matter, and even assuming that the Board agent did tell Malthesen that only one list was permitted in the polling area, I would find such a remark insufficient to warrant setting aside the election. According to Malthesen, the Board agent made the remark when he confiscated a copy of the Employer's payroll list from her. As the majority acknowledges, it was proper for the Board agent to confiscate the payroll list which was in effect a second eligibility list.[2] Although the majority also notes that an observer is permitted to retain a list of employees whom he or she intends to challenge, and it is improper for a Board agent to prevent the observer from doing so,[3] that reasoning is unavailing here for the list that the Board agent took from Malthesen was not in fact a challenge list. Moreover, Malthesen testified that she knew at the time that Wedde's name was the only name on the official *Excelsior* eligibility list which was not on the list that the Board agent took from her. In these circumstances, the statement that only one list was permitted could not possibly have prejudiced the Employer with respect to making challenges.[4]

Finally, the majority's conclusion that the Board agent engaged in misconduct is predicated on their finding that Wedde was not an eligible voter. By reaching the issue of Wedde's eligibility the majority goes well beyond the scope of the Board's previous Order and contravenes well-established Board policy.[5] Thus, longstanding Board policy is to resolve eligibility only through the challenge procedure and not as here through the objections procedure. In accordance with this policy, the hearing officer specifically ruled that Wedde's eligibility was not a litigable issue, and therefore denied the Union's request for a continuance to prepare evidence on that issue. In my view, the hearing officer's ruling was clearly correct, and the majority's decision to resolve the eligibility issue is clearly erroneous.[6]

Based on all the foregoing, I would adopt the hearing officer's recommendation that the Union be certified. Accordingly, I dissent from my colleagues' direction of a second election.

[1] Malthesen nevertheless failed to challenge Wedde when Wedde arrived in the polling area. This can only be explained as an omission on Malthesen's part.

[3] *Milwaukee Cheese Co.*, 112 NLRB 1383 (1955).

[3] *Bear Creek Orchards*, 90 NLRB 286 (1950).

[4] See *Harlem River Consumers Cooperative*, 191 NLRB 314, 323 (1971): "the instructions of the Board agent to the observers that they were not permitted to have lists other than the official eligibility list do not warrant the setting aside of the election."

[5] See, e.g., *Crown Machinery Co.*, 205 NLRB 237 (1973), *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946). It is true that in *Kentfield Medical Hospital*, 219 NLRB 174 (1975), relied on by the majority, the Board resolved an eligibility question in an objections proceeding, but did so only to avoid deciding a question of Board agent misconduct. In any event *Kentfield* is an aberration and in my view it should not be followed.

[6] By the majority's reaching the issue of Wedde's eligibility in this objections proceeding I am at a complete loss to understand how under their view they can conclude that the Board agent engaged in misconduct by implying that a postelection procedure to resolve eligibility existed. Thus, by reaching Wedde's eligibility in this case the majority has created the very procedure which they find the Board agent improperly implied existed.